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Nos. 99-224, 99-582

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In The

Supreme Court of the United States

CHARLES B. MILLER, SUPERINTENDENT OF THE PENDLETON CORRECTIONAL FACILITY, et al.,

Petitioner,

versus

RICHARD A. FRENCH, et al.,

Respondents.

UNITED STATES,

Petitioner,

versus

RICHARD A. FRENCH, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF LAW PROFESSORS ERWIN CHEMERINSKY, MICHAEL C. DORF, BARRY FRIEDMAN, JAMES LIEBMAN, GENE R. NICHOL, JR., AND MARCY STRAUSS AMICI CURIAE IN SUPPORT OF RESPONDENTS RICHARD A. FRENCH, et al.

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QUESTION PRESENTED

The explicit language of section (e) of the Prison Litigation Reform Act, 18 U.S.C. §3626(e), compels a federal trial court which is confronted with a motion to terminate prospective relief in a civil action with respect to prison conditions to rule on the motion within a thirty (30) day period which can, for good cause other than calendar congestion, be extended for an additional sixty (60) day period. If the trial court fails to timely rule upon the motion, then the motion is temporarily granted in that all prospective relief is suspended pending final resolution by the trial court. Amici curiae present this Question as appropriate for resolving this case and encompassed by the grant of certiorari:

Whether 18 U.S.C. §3626(e) is unconstitutional as violating separation of powers because it retroactively suspends final federal court judgments imposed as remedies for constitutional violations.

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INTERESTS OF AMICI CURIAE[1]

Amici curiae are law professors who specialize in the fields of Constitutional Law and Federal Courts and write this brief out of the hope that their expertise might be helpful to the Court.

Erwin Chemerinsky is the Sydney M. Irmas Professor of Public Interest Law, Legal Ethics, and Political Science, at the University of Southern California. He has authored treatises on both constitutional law and federal courts and many articles in these fields.

Michael C. Dorf is a Professor of Law and Vice Dean at Columbia University School of Law. Professor Dorf has co-authored a book on constitutional law and has written many articles concerning constitutional law and federal court jurisdiction.

Barry Friedman is a Professor of Law at Vanderbilt University Law School and a Visiting Professor of Law at New York University School of Law. He is the author of many articles on constitutional law and federal court jurisdiction.

James Liebman is the Simon H. Rifkind Professor at Columbia University School of Law. He is the author of *Habeas Corpus: Practice and Procedure*, a treatise on habeas

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for amici state that no counsel for a party authored this brief in whole or in part and that no person, other than amici or its counsel, made a monetary contribution to the preparation and submission of this brief.

corpus, and many articles on aspects of constitutional law and federal court jurisdiction.

Gene R. Nichol, Jr. is the Dean of the University of North Carolina School of Law and the William Rand Kenan, Jr. Professor of Law. He has written extensively on constitutional law and federal jurisdiction.

Marcy Strauss is a Professor of Law at Loyola Law School in Los Angeles, California. She is the author of many articles on constitutional law and federal court jurisdiction.

SUMMARY OF ARGUMENT

This case is about one of the most important and basic principles of separation of powers: Congress cannot direct how a federal court rules in a specific case and especially cannot retroactively suspend a federal court's judgment. *See, e.g., Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995); *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872); *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792).

Section 3626(e)(2) of the Prison Litigation Reform Act, 18 U.S.C. §3626, et seq., does exactly this. The Act authorizes government defendants in prison condition cases to move for termination of prospective court orders and allows a federal court to continue the injunctive relief only by making specific findings as to the need for such relief. Section (e)(2) provides that a federal court must decide upon a defendant's motion within 30 days or the existing final judgment of the court is automatically stayed. The law allows a federal court to extend the time

period by no more than 60 days, but provides that "[n]o postponement shall be permissible because of general congestion of the court's calendar." 18 U.S.C. §3626(e)(3).

Therefore, if the federal court does not rule within the 30, or at most 90, day period, the law requires the court, at least temporarily, to grant the government's motion to end the injunction. This Court long has ruled that it violates separation of powers for Congress to command that a federal court rule in favor of a particular litigant. *See, e.g., United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872).

Indeed, §3626(e)(2) is particularly pernicious from a constitutional perspective because it retroactively suspends final judgments of federal courts imposed as remedies for constitutional violations. A simple syllogism explains the unconstitutionality of §3626(e)(2):

> MAJOR PREMISE: A federal statute is unconstitutional if it retroactively suspends a final judgment or compels a federal court to do so.
>
> MINOR PREMISE: Section 3626(e)(2) is a federal statute that retroactively suspends a final judgment or compels a federal court to do so.
>
> CONCLUSION: Section 3626(e)(2) is unconstitutional.

The major premise of this syllogism has been established and followed since the earliest days of the nation. In *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792), Justice Iredell declared that no federal court judgment is "liable to a revision, or even suspension, by the legislature itself." 2 U.S. (2 Dall.) at 412. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), reaffirmed this principle.

The minor premise of the syllogism also is clearly correct: §3626(e)(2) orders the suspension of final judgments of federal courts. Section 3626(e)(2) commands that federal courts grant defendants' motions to end injunctions against them if there is not a ruling on the motions within 30, or at the greatest 90 days. Under *Klein*, Congress cannot issue such a directive to federal courts to decide motions in a particular way. Moreover, in this case, the effect of §3626(e)(2) is to retroactively suspend a final judgment of a federal court. A federal district court issued a permanent injunction concerning the Pendleton Correctional Facility to remedy constitutional violations. *See French v. Owens*, 777 F.2d 1250, 1258 (7th Cir. 1985). Subsequently, the Prison Litigation Reform Act was enacted. An injunction in place before the Act is lifted solely by virtue of the statute.

The conclusion thus follows: §3626(e)(2) is unconstitutional. Congress cannot direct that federal courts decide cases in favor of the government, or any party, and Congress certainly cannot order the suspension of final federal court judgments. Congress, of course, under some circumstances may set time limits for court action, but never can these limits be enforced by Congress suspending final judgments of federal courts. In cases involving prospective relief under federal statutes, Congress can change the underlying substantive law and thereby cause courts to reconsider injunctions based on the prior law. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855). But no case decided by this Court ever has approved Congress suspending federal court orders imposed as remedies in constitutional

cases. According Congress such authority would dramatically undermine the judicial power as all court orders remedying constitutional violations could be suspended or ended by legislative action.

ARGUMENT

THE AUTOMATIC STAY PROVISION OF THE PRISON LITIGATION REFORM ACT IS UNCONSTITUTIONAL BECAUSE IT RETROACTIVELY SUSPENDS A FINAL JUDGMENT OF A FEDERAL COURT IMPOSED AS A REMEDY FOR CONSTITUTIONAL VIOLATIONS

A. A Federal Statute Cannot Retroactively Suspend a Final Judgment or Compel a Federal Court to Do So, Particularly a Judgment Entered as a Remedy for Constitutional Violations

Amici curiae submit this brief to urge this Court to affirm a basic and essential principle of separation of powers: Congress cannot retroactively overturn a final judgment of a federal court, either by legislatively ordering it suspended or by compelling a federal court to stay its prior judgment. This is a principle that has been recognized since the earliest days of the nation and it is crucial "both to protect the role of the independent judiciary within the constitutional scheme of tripartite government, . . . and to safeguard litigants' right to have claims decided by judges who are free from potential domination by other branches of government." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986) (citations and internal quotation marks omitted).

Thus it long has been firmly established that federal legislation cannot overturn or even suspend a final judgment of a federal court. In *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792), Justice Iredell declared: "[No] decision of any court of the United States can, under any circumstance, in our opinion, agreeable to the constitution, be liable to a revision, or even suspension, by the legislature itself, in whom no judicial power of any kind appears to be vested." 2 U.S. (2 Dall.) at 412.

In *Hayburn's Case*, the Justices declared unconstitutional a federal law that allowed the Secretary of War to revise federal court determinations of the amount of benefits owed to Revolutionary War veterans. Although the Supreme Court never explicitly ruled the statute unconstitutional, five of the six Supreme Court justices, while serving as Circuit Court judges, found the law invalid. The justices explained that the law was unconstitutional because it meant that judicial orders could be "revised and controuled by the legislature, and by an officer in the executive department. Such revision and controul we deemed radically inconsistent with the independence of that judicial power which is vested in the courts." *Id.* at 411. *Accord C. & S. Air Lines v. Waterman Corp.*, 333 U.S. 103, 113 (1948) ("Judgments within the powers vested in courts by [Article III] may not lawfully be revised, overturned or refused faith and credit by another Department of Government.")

More recently, this Court emphatically reaffirmed the principle that it is unconstitutional for federal legislation to retroactively overturn final judicial orders. In *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), this Court

applied the principle of *Hayburn's Case* to find unconstitutional a federal statute that overturned a Supreme Court decision dismissing certain cases. In 1991, the Court ruled that actions brought under the securities laws, specifically §10(b) and Rule 10(b)(5) had to be brought within one year of discovering the facts giving rise to the violation and within three years of the violation. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991). Congress then amended the law to allow cases to go forward that were filed before this decision if they could have been brought under the prior law.

In *Plaut*, this Court declared the new statute unconstitutional as violating separation of powers. Although the Court acknowledged that *Hayburn's Case* was distinguishable, the Court found *Hayburn's* underlying principle of finality applicable. Justice Scalia writing for the Court said that the Constitution "gives the Federal Judiciary the power, not merely to rule on cases, but to decide them." 514 U.S. at 244. The Court concluded that the "judicial power is one to render dispositive judgments," and therefore the federal law "effects a clear violation of separation-of-powers." *Id.* at 219, 225.

In *Plaut* this Court unequivocally held that Congress by statute cannot act retroactively to overturn or suspend an existing final court judgment. Justice Scalia, writing for the Court, stated: "Having achieved finality, however, a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable *to that very case* was something other than what the court said it was." *Id.* at 227 (emphasis in original).

Just as Congress cannot by legislation overturn a final judicial judgment, nor can it order that a federal court suspend or lift its own judgment. Indeed, in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872), this Court held that Congress cannot mandate how federal courts act in particular cases. In 1863, Congress adopted a statute providing that individuals whose property was seized during the Civil War could recover the property, or compensation for it, upon proof that they had not offered aid or comfort to the enemy during the war. The Supreme Court subsequently held that a presidential pardon fulfilled the statutory requirement of demonstrating that an individual was not a supporter of the rebellion. *United States v. Padelford*, 76 U.S. (9 Wall.) 531 (1869).

In response to this decision and frequent pardons issued by the president, Congress quickly adopted a statute providing that a pardon was inadmissible as evidence in a claim for return of seized property. Moreover, the statute provided that a pardon, without an express disclaimer of guilt, was proof that the person aided the rebellion and would deny the federal courts jurisdiction over the claims. The statute declared that upon "proof of such pardon . . . the jurisdiction of the court in the case shall cease, and the court shall forthwith dismiss the suit of such claimant." 92 Stat. 2076.

The Supreme Court held that the statute was unconstitutional. While acknowledging Congress' power to create exceptions and regulations to the Court's appellate jurisdiction, the Supreme Court said that Congress cannot direct the results in particular cases. The Court stated:

> "What is this but to prescribe a rule for the decision of a cause in a particular way?. . . . Can we do so without allowing one party to the controversy to decide it in its own favor? Can we do so without allowing that the legislature may prescribe rules of decision to the judicial department in the cases pending before it?. . . . We think not. . . . We must think that Congress has inadvertently passed the limit which separates the legislative power from the judicial power." 80 U.S. at 146-47.

Thus, *Klein* stands for the basic proposition that Congress cannot dictate the results in specific cases.

Together, decisions such as *Hayburn's Case*, *Plaut*, and *Klein* establish a fundamental and essential principle of separation of powers: Congress cannot directly overturn or suspend final federal court judgments or order that federal courts take such an action. Professor Tribe clearly explained this separation of powers principle: "Congress can be said to usurp the judicial function and violate the separation of powers if it undertakes to resolve an art. III case or controversy with a party-specific legislative decree imposing restrictions of its own." Laurence H. Tribe, *American Constitutional Law* 285 n.86 (3d ed. 2000).

Congress certainly may change the substantive statutory law to be applied in future cases. *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992). In cases involving injunctions under federal statutes, Congress can alter the underlying law and thereby cause reconsideration of the prospective relief. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855) (discussed more fully below in section B); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. at 232. But what Congress never may do is

retroactively overturn or suspend a final judicial judgment or order federal courts to do this. Nor may Congress direct a federal court to decide a case in a particular manner.

To accord such authority to Congress would be to alter dramatically the federal balance of power. For instance, in *Cooper v. Aaron*, 358 U.S. 1 (1958), this Court affirmed a federal court's desegregation order, an injunction similar in character and type to the remedy imposed in this case. It is unthinkable that Congress, by statute, could have suspended the federal court's injunction or ordered the district court to lift it, even for a short period of time. Such legislation would strike at the very core of the federal judicial power. *See* Henry Hart, *The Power of Congress to Limit Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1402 (1953) (Congress cannot act in a manner that will destroy the essential function of the federal courts in the constitutional system).

B. The Automatic Stay Provision of the Prison Litigation Reform Act, §3626(e)(2), Is a Federal Law that Retroactively Suspends a Final Court Judgment Remedying Constitutional Violations

The Prison Litigation Reform Act provides for the termination of prospective court orders concerning prison conditions two years after their entry, upon motion from the defendant, unless a federal court determines that the "prospective relief remains necessary to correct a current and ongoing violation of the federal right." 18 U.S.C. §3626(b)(2). The sole issue before the

Court in this case is the constitutionality of §3626(e)(2) which provides that a federal court must decide upon a defendant's motion within 30 days or the existing final judgment of the court is automatically stayed. The law allows a federal court to extend the time period by no more than 60 days, but provides that "[n]o postponement shall be permissible because of general congestion of the court's calendar." 18 U.S.C. §3626(e)(3).

Section (e)(2) compels that the court rule in favor of the government and lift the injunction if it cannot meet the requirements of §3626 within 30, or at most 90, days. This is Congress directing a result for a particular party, at least temporarily, in constitutional litigation. This is exactly what *Klein* forbids. It obviously would be unconstitutional under *Klein* for Congress to enact a law requiring that federal courts decide all motions for summary judgment in civil rights cases within 90 days and mandating that if a court fails to do so it must rule in favor of the government. This is what §3626(e)(2) does in compelling the court to grant relief to the government by lifting the injunction against it if the court does not act within the 30/90 day period.

Moreover, and constitutionally even worse, §(e)(3) does this retroactively, ordering that the federal court rule in favor of the government by suspending an existing injunction. In applying the separation of powers principle described above to the automatic stay provision in §3626(e)(2), this Court should ask three questions: 1) Is there a final judgment of a federal court? 2) Is the federal statute being applied retroactively? 3) Does the federal statute suspend a final judgment of a federal court or order a federal court to do this? If the answer to all three

questions is affirmative, the law is clearly unconstitutional under *Hayburn's Case*, *Plaut*, and *Klein*.

All three of these factors unquestionably are present here. First, there is no doubt in this case that the federal district court entered a final judgment concerning the Pendleton Correctional Facility and that the injunction was affirmed by the United States Court of Appeals for the Seventh Circuit. *French v. Owens*, 777 F.2d 1250, 1258 (7th Cir. 1985). It, of course, is firmly established that such court orders are final judgments of federal courts. *See Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992). *Rufo* is explicit that the ability of a court of equity to reconsider injunctive relief does not lessen its status as a final judgment. *Id.* at 391. In fact, all federal court judgments in civil cases are potentially subject to reconsideration pursuant to Federal Rule of Civil Procedure 60(b), but they nonetheless, of course, are regarded as final judgments.

Second, nor is there question that §3626(e)(2) is being applied retroactively in this case. The federal court order and judgment concerning the Pendleton Correctional Facility were entered before the Prison Litigation Reform Act was enacted in 1996. This is not Congress attempting to regulate the content and terms of future injunctions to be issued by the federal courts. Rather, this is a federal law that applies retroactively to judgments entered before its adoption. *See Landgraf v. USI Films Products*, 511 U.S. 244, 270 (1994) (retroactive legislation is that which "attaches new legal consequences to events completed before its enactment.")

Third, §3626(e)(2) suspends a federal court judgment if a federal court does not act within 30 days of a defendant's motion, a time period which can be extended by no more than 60 days. There are only two possible ways to characterize §3626(e)(2): either it is a federal law that directly suspends final judgments if a court does not act within the time limits or it is a federal law that commands federal courts to issue a stay of their prior judgments if the court does not act within the 30/90 day time periods. Either characterization is a federal law that effectively suspends a final federal court judgment and thus violates separation of powers.

The final judgment of the federal court in this case is operative and in effect until the federal law, §3626(e)(2), mandates its suspension. *Hayburn's* case expressly declares that Congress cannot mandate "suspension" of a federal court order. 2 U.S. (2 Dall.) at 412. *Plaut* and *Klein* are clear that Congress cannot order courts to do this. For this reason, the Sixth Circuit properly found that requiring a federal court to comply with the automatic stay provision in §3626(e)(2) violates separation of powers because it is "direct legislative suspension of orders of article III courts." *Hadix v. Johnson*, 144 F.3d 925, 941 (6th Cir. 1998). Similarly, the Court of Appeals in this litigation correctly reasoned that "(e)(2) violates the separation of powers principle because it is a direct legislative suspension of a court order." *French v. Duckworth*, 178 F.3d 437, 446 (7th Cir. 1999), *cert. granted*, 120 S.Ct. 578 (1999).

The State of Indiana argues that §3626(e)(2) "neither legislatively suspends court orders nor mandates a rule of decision." Brief of Petitioners Charles B. Miller, et al., ("Pet.Br.") at 18. The State argues that section (e)(2) is

simply a procedural device that operates prospectively. This argument, however, ignores the purpose and effect of section (e)(2): valid final orders of the court, entered as a remedy to constitutional violations, will be suspended solely because of the mandate of the federal statute. This is exactly what *Plaut* forbids.

The cases relied upon by the State of Indiana, and *amici curiae* in support of the State, are distinguishable because none involved Congress retroactively suspending a final court judgment that had been imposed as a remedy for constitutional violations. For example, *Pennsylvania v. Wheeling & Belmont Bridge Co.*, did not involve a federal law that retroactively suspended a federal court decision. In fact, that decision expressed the separation of powers principle that is at stake in this case. The Court declared: "[I]t is urged, that the act of Congress cannot have the effect and operation to annul the judgment of this court already rendered, or the rights determined thereby. . . . This, as a general proposition, is certainly not to be denied, especially as it respects adjudication upon the private rights of parties. When they have passed into judgment the right becomes absolute, and it is the duty of the court to enforce it." 59 U.S. (18 How.) at 431.

Wheeling Bridge involved a court order requiring that a bridge be raised or removed because it was a hazard to navigation and a public nuisance in its existing condition. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518 (1852). Congress subsequently amended the law to legalize the bridge. The Court then upheld this as constitutional based on Congress' authority to alter the substantive law that was the basis for the injunction.

Wheeling Bridge thus stands for the simple proposition that where Congress has the authority to alter the underlying substantive law relied upon for prospective relief, a court has the authority to reconsider its earlier order in light of the change in the law. This is what *Plaut* was referring to when it cited *Wheeling Bridge* as allowing Congress to alter "the prospective effect of injunctions entered by Art. III courts." 514 U.S. at 232. In this case, however, the underlying substantive law is the Constitution, obviously not subject to change by Congress. Moreover, *Wheeling Bridge* did not involve Congress mandating the suspension of any federal court order.

Similarly, the other examples relied upon by the State and *amici* involved situations where Congress prospectively modified federal court authority in statutory cases. For instance, the State invokes *Lauf v. E.G. Shiner & Co.*, 303 U.S. 323 (1938), which upheld a federal law that required specific federal court findings before the court may issue an injunction in labor cases. Pet.Br. at 20-21. However, this federal law concerned federal court power in enforcing federal *statutory* rights. The law also was prospective in its application and suspended no final judgments. Here, though, §3626(e)(2) applies retroactively upon court orders in constitutional cases.

The distinction between Congress' authority to regulate prospectively in statutory cases and Congress' power to act retroactively in constitutional cases is crucial. Where Congress creates the right and provides the remedy, Congress has broad latitude to prescribe the terms and scope of the relief in future cases. But where the Constitution creates the right and a federal court has entered a final judgment, Congress does not have the

authority to suspend it. This Court has recognized the difference between constitutional and statutory rights relative to Congress' power, such as in stating: "[T]here is a critical difference between rights created by federal statute and rights recognized by the Constitution. . . . [S]uch a distinction seems to us to be necessary in light of the delicate accommodations required by the principle of separation of powers reflected in Article III." *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 83-84 (1982).

Simply put, §3626(e)(2) automatically suspends final judgments of federal courts in constitutional cases if a federal court does not act within 30/90 days of the defendant's motion. No case relied upon by Petitioners involved a federal law retroactively suspending a final judgment of a federal court in a constitutional case. *See Plaut v. Spendthrift Farm Inc.*, 514 U.S. at 240 ("We know of no previous instance in which Congress has enacted retroactive legislation requiring an Article III court to set aside a final judgment, and for good reason. The Constitution's separation of legislative and judicial powers denies it the authority to do so.")

C. The Automatic Stay Provision of the Prison Litigation Reform Act, §3626(e)(2), Is Unconstitutional

Section 3626(e)(2) means that the federal court's judgment in this case must be suspended by the federal district court if it does not act within 30/90 days of the defendant's motion. A federal law that orders the suspension of a court order is unconstitutional, for the reasons

explained above, and thus *amici* urge this Court to affirm the Seventh Circuit. Congress is compelling federal courts to rule in favor of the government, and lift injunctions against them, if the courts cannot meet the time limits. Under cases such as *Klein*, Congress violates separation of powers when it directs the judiciary to decide cases in a particular way.

The State argues that Congress frequently sets time limits for court actions and §3626(e)(2) is no different. The State, for example, points to the time limits on temporary restraining orders in Federal Rule of Civil Procedure 65(b), which provides that a federal court's temporary restraining order automatically expires after 10 days, with one possible 10-day extension, if the court has not held a hearing with notice. Pet.Br. at 20. The State also points to the Norris-Laguardia Act, 29 U.S.C. §107, which provides that a temporary restraining order in a labor dispute "shall be effective for no longer than five days and shall become void at the expiration of said five days." Judge Easterbrook, in his dissent from the denial of a rehearing en banc, provided a long list of statutes that impose time limits on federal court judges. 178 F.3d at 451-453 (Easterbrook, J., dissenting).

No one denies that Congress can impose time limits on federal courts in some circumstances. However, what Congress cannot do is enforce the time limits by ordering the suspension of final court judgments. None of the other time limits mentioned by the State or described by Judge Easterbrook involved Congress *retroactively* mandating the stay of a federal court's final order and judgment. There may be many types of time limits that can be imposed, and even many ways of enforcing the limits,

but one thing that Congress clearly cannot do without violating separation of powers is compel suspension of a final federal court judgment.

Nor may Congress use time limits to direct results for particular parties as it has done here. A simple example is illustrative. It can be assumed that Congress has the constitutional authority to create a Term of the Supreme Court and that it could require that the Court decide all cases on its docket by June 30 of each year. However, it surely would be unconstitutional if the federal law said that all cases not decided by June 30 must be decided in favor of the government. Yet, that is exactly what §3626(e)(2) does: it imposes a time limit and requires that any case not resolved within it be decided in favor of the government by suspending the prior final judgment.

Moreover, whatever authority Congress has to set the terms and conditions of future injunctions, Congress cannot retroactively impose new requirements that have the effect of overturning final court orders. As this Court explained in *Plaut*: "It is no indication whatever of the invalidity of the constitutional rule which we announce, that it produces unhappy consequences when a legislature lacks foresight, and acts belatedly to remedy a deficiency in the law." 514 U.S. at 237.

Congress almost certainly could not have adopted a constitutional law that required federal courts to vacate every final judicial order concerning prison conditions two years after entry. This would be exactly what is forbidden by cases such as *Hayburn's Case*, *Plaut*, and *Klein*. Yet, the 30/90 days time period specified in section (e)(2) has virtually the same effect. As one commentator

explained concerning the provision: "Congress has reopened 'final decisions' by retroactive changes to the rules of decision, and virtually compelled a decision favorable to the governmental entity involved through the short time permitted for the judge to make the required findings necessary to support continuation of a consent decree." Ira Bloom, *Prisons, Prisoners, and Pine Forests: Congress Breaches the Wall Separating Legislative from Judicial Power*, 40 Ariz. L. Rev. 389, 410 (1998).

Indeed, as the Seventh Circuit noted, a government defendant, simply by delaying during the 30/90 day period can succeed in forcing the district court to suspend its earlier judgment. The Seventh Circuit observed: "Yet the state need only drag its feet or confront genuine difficulty in responding to requests for information that is relevant to the question whether the decree continues to be necessary, as defined by (b)(2) and (b)(3), in order to win its stay. . . . Section 3626 constrains the authority of the district courts to impose and sustain prospective relief." 178 F.3d at 444.

Thus, the practical effect of §3626(e)(2) is to order federal courts to rule in favor of defendants, at least on their motions to stay final court orders concerning prison conditions. This is exactly what cases such as *Plaut* and *Klein* forbid Congress from doing. To accord Congress this authority here in prisoner litigation, would mean that Congress could order the lifting of judicial orders in any cases, ranging from business litigation to school desegregation cases. It would give Congress unprecedented ability to not only specify time limits, but to enforce them by directing results and by lifting final judicial judgments.

In *Hayburn's Case*, in the earliest days of American history, Supreme Court declared that "revision and controul" of judgments by Article III courts is "radically inconsistent with the independence of that judicial power which is vested in the courts." 2 U.S. (2 Dall.) at 413 (opinion of Iredell, J.). Almost 200 years later, in *Plaut*, this Court said that "the doctrine of separation of powers is a *structural safeguard* rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified. In its major features (of which the conclusiveness of judicial judgments is assuredly one) it is a prophylactic device, establishing high walls and clear distinctions." 514 U.S. at 239. The Court found the federal law in *Plaut* "unconstitutional to the extent that it requires federal courts to reopen final judgments entered before its enactment." *Id.* at 240.

Amici curiae urge the Court to reaffirm these principles and to find §3626(e)(2) unconstitutional precisely because it requires federal courts to reopen final judgments – and indeed to suspend those judgments – entered before its enactment.

CONCLUSION

For these reasons, the Court should affirm the judgment of the Seventh Circuit holding §3626(e)(2) of the Prison Litigation Reform Act unconstitutional.

Respectfully submitted,

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